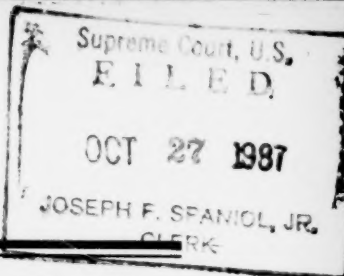


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87-701

No. \_\_\_\_\_



**In the Supreme Court of the United States**

**October Term, 1987**

**TERRENCE K. BRADY ..... PETITIONER**

**V.**

**H. FOSTER PETTIT, MAYOR**

**Lexington-Fayette Urban  
County Government; DEAN**

**D. HUNTER, JR., Chief  
Administrative Officer of  
the Lexington-Fayette**

**Urban County Government;**

**SIDNEY C. KINKEAD, JR.,  
Chairman; JULIAN A. JACKSON,  
SR., WILFRED T. SEALS,**

**WALTER LEET, JR. and WANDA**

**V. CRANFILL, Members of  
the Lexington-Fayette Urban  
County Government Civil Service**

**Commission ..... RESPONDENTS**

**PETITION FOR WRIT OF CERTIORARI TO THE  
KENTUCKY COURT OF APPEALS**

**WILLIAM C. JACOBS**

**173 North Limestone Street  
Lexington, Kentucky 40507  
(606) 254-9086**

*Attorney for Petitioner*

130 pp



**(a) QUESTIONS PRESENTED FOR REVIEW**

1. Does it violate the First Amendment speech rights of a civil service administrator to discharge him for the "misconduct" of not "first or simultaneously" proceeding through governmental channels before making substantially truthful statements to the press about abuses of the civil service system by officials, not his supervisors?

2. Where the employment-related consequences of a civil service administrator's statements to the press about official abuses of the civil service system were charged in non-specific terms, does it violate the administrator's First Amendment speech rights to discharge him for the consequences of his substantially truthful public speech, in the absence of findings of specific dire employment-related consequences of his public statements?

3. Where the "merit" of his public statements was not an element of the disciplinary charges against a civil service administrator, but in firing him the Commission found his statements to be substantially true, was the administrator's claim that his statements were First Amendment protected, defeated by the reviewing court's finding that his statements, as "opinions and conclusions", were "substantially false" because a reasonable person would not have concluded similarly?

4. May the discharge of a public employee for making public statements on matters of public concern, without regard for their truth, be upheld by the reviewing court's holding that by exercising his duties to make a "reasonable and rational investigation" and "to consider the consequences of public speech", the employee should not have spoken "at the time and in the manner" he did, where the employee claimed that his speech was First Amendment protected conduct?

5. May a state court, by setting aside its order permitting a 42 U.S.C. §1983 amended complaint to be

**QUESTIONS PRESENTED (continued)**

**filed, on grounds that the §1983 claim would be barred by limitations if filed as an independent action, defeat the §1983 claim found to be grounded on the events which precipitated the original action, and timely under the "relation back" provisions of Kentucky Civil Rule 15.03(1)?**

**(b) PARTIES**

The caption of the case in this Court contains the names of all parties.

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### (d) OPINIONS BELOW

On December 10, 1974, the Lexington-Fayette Urban Government Civil Service Commission rendered its Opinion, Findings, and Decision discharging the Petitioner, p. 23a, *infra*.

On February 7, 1977, the Fayette Circuit Court, George E. Barker, J., rendered its unreported Opinion, p. 32a, *infra*.

On May 26, 1978, the Kentucky Court of Appeals rendered its unpublished Opinion, p. 50a, *infra*.

On July 3, 1979, the Kentucky Supreme Court rendered its published Opinion in *Brady v. Pettit*, Ky., 586 S.W.2d -29 (1979), reversing with directions, p. 55a, *infra*.

On April 1, 1986, the Fayette Circuit Court, George E. Barker, J., rendered its unpublished Opinion and Order, p. 4a, *infra*.

On May 22, 1987, the Kentucky Court of Appeals rendered its unpublished Opinion, p. 1a, *infra*.

On July 30, 1987, the Kentucky Supreme Court, by Order, denied discretionary review, p. 68a, *infra*.

### (e) JURISDICTION

The highest court of Kentucky in which a decision could be had was the Kentucky Court of Appeals. Under KRS 22A.020(1), *infra*, an appeal of a final judgment of a circuit court may be taken to the Kentucky Court of Appeals as a matter of right. Review of an opinion of the Court of Appeals by the Kentucky Supreme Court may be had only upon grant of a motion for discretionary review made pursuant to K.R.Civ.P. 76.20. On July 30, 1987, the Kentucky

Supreme Court denied Petitioner's timely motion, under K.R.Civ.P. 76.20, for discretionary review of the May 22, 1987 Opinion of the Kentucky Court of Appeals. The Kentucky Court of Appeals had affirmed the April 1, 1986 final judgment of the Fayette Circuit Court, adopting the trial court's Opinion of that date, as its own.

The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C. §1257(3).

### **(f) CONSTITUTIONAL PROVISIONS**

The First Amendment of the United States Constitution provides, in pertinent part:

Congress shall make no law . . . abridging the freedom of speech . . . .

The Fourteenth Amendment to the United States Constitution, Section 1, provides, in pertinent part:

. . . nor shall any state deprive any person of . . . liberty, or property, without due process of law . . . .

### **STATUTORY PROVISIONS**

KRS 22A.020(1), in pertinent part:

. . . an appeal may be taken as a matter of right to the Court of Appeals from any . . . final judgment, order, or decree in any case in the circuit court. . . .

KRS 67A.280(1), in pertinent part:

No employee in the classified service of urban-county government . . . shall be dismissed, suspended or reduced in grade or pay for any reason except inefficiency, misconduct, insubordination or violation of law involving moral turpitude.

KRS 67A.280(3), in pertinent part:

Upon the hearing the charges shall be considered traversed and put in issue, and the trial shall be limited to the issues presented by the written charges . . . .

KRS 67A.280(6):

The civil service commission shall punish any employee found guilty by reprimand or a suspension for any length of time not to exceed six (6) months, or by reducing the grade, if the employee's classification warrants, or by combining any two (2) or more of these punishments, or by dismissal. No employee shall be reprimanded, removed, suspended or dismissed except as provided in this section.

## **KENTUCKY RULE OF CIVIL PROCEDURE**

Rule 15.03 *Relation Back of Amendments*, in pertinent part:

(1) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

## **CHARTER PROVISIONS OF LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT**

Section 4.01 *Urban County Council Created; Number of Members*, in pertinent part:

The legislative authority of the Lexington-Fayette Urban County Government . . . . shall be vested in the Urban County Council . . . (which) . . . shall be . . . elected . . . .

Section 5.02 *Election; Term of Office; and Qualifications*, in pertinent part:

The Mayor shall be elected for a term of four (4) years . . . .

Section 5.04 *Power of Authority*, in pertinent part:

Except as otherwise provided in this Charter, the Mayor is authorized to supervise, administer and control all departments as may be created in this Charter . . . .

. . . . .

The Mayor is authorized to require any executive officer of the Merged Government to submit to him or to the Chief Administrative Officer, written or oral reports and information relating to the business and general welfare of the Merged Government. The Mayor shall have the right to examine and inspect the books, records and official papers of any department, board, commission, office or agency of the Merged Government . . . .

Section 5.09 *Chief Administrative Officer*, in pertinent part:

... the Council shall select and employ a Chief Administrative Officer . . . .

The Chief Administrative Officer may be removed without cause by a three-fifths ( $\frac{3}{5}$ ) vote of the entire Council during his first year of service. After one year of service, the Chief Administrative Officer may be removed without cause by a three-fifths ( $\frac{3}{5}$ ) vote of the entire Council, provided that he shall be granted six (6) months notice of the Council's intention to remove him . . . .

Section 5.10 *Powers and Duties of the Chief Administrative Officer*, in pertinent part:

The Chief Administrative Officer shall:

A. Exercise direct administrative control and supervision over the Office of Administrative Services as provided for in Article Six of this Charter.

. . . .

Section 6.02 *Principal Officers of the Executive Branch*, in pertinent part:

- The Office of Administrative Services shall be under the direct control of the Chief Administrative Officer . . . .

Section 6.03 *Division Directors and Employees*, in pertinent part:

Each division within the Office of Administrative Services and the various Executive Departments shall be headed by a Division Director. . . . all Division Directors shall be under the classified civil service system of the Merged Government.

. . . .



Section 6.04 *Office of Administrative Services*, in pertinent part:

The Office of Administrative Services shall be organized into a Division of Personnel . . . and such other divisions as the Council may prescribe.

The Division of Personnel shall be responsible for the administration of all personnel programs of the Merged Government, including such civil service programs as may be established under the provisions of this Charter. . . .

Section 7.03 *Civil Service Commission*, in pertinent part:

. . . . (The Civil Service) Commission shall advise and assist the Director of Personnel in the Office of Administrative Services and the Chief Administrative Officer on matters pertaining to the operation and administration of the classified civil service system of the Merged Government within the terms and limitations set forth in Article Nine of this Charter.

. . . . The members of said commission shall be appointed by the Mayor subject to confirmation by a majority of the council members . . . .

Section 9.04 *Adoption of a Classified Civil Service Plan for the Merged Government*, in pertinent part:

. . . . In no case shall the Council initiate or enact any . . . additions, revisions or amendments without first securing the written recommendations of the Mayor, the Chief Administrative Officer and the Director of the Division of Personnel.

Pursuant to Section 7.03 of this Charter, the Division of Personnel shall consult with and seek the advice of the Civil Service Commission on all matters pertaining to the preparation, adoption and subsequent revision of the comprehensive classified civil service plan for the Merged Government.

Section 9.05 *Administration of the Classified Civil Service*, in pertinent part:

Pursuant to the provisions of Section 6.04 of this Charter, the Division of Personnel in the Office of Administrative Services shall be responsible for the administration of all ordinances and regulations pertaining to the classified civil service, including all recruitment, examination, classification, probation, promotion and compensation programs affecting the classified civil service.

The Civil Service Commission, in accordance with the provisions of 7.03 of this Charter, shall advise the Division of Personnel on all matters pertaining to the management and administration of the classified civil service . . . . Said commission shall also hear and decide, subject to appeal . . . all cases involving the suspension, dismissal or other disciplinary actions brought against employees covered by the classified civil service provisions of this Charter.

**(g), (h) STATEMENT OF THE CASE**

This action has twice proceeded through the trial court, intermediate appellate and highest appellate levels of Kentucky's state courts. At all times pertinent, Petitioner, Terrence K. Brady, (Brady) was Director of Personnel for the Lexington-Fayette Urban - County Government (Government), and Respondent, H. Foster Pettit (Mayor) was the duly elected Mayor of the Government. Charter Sec. 6.05, *supra*. Respondent, Dean D. Hunter, (CAO) was the Chief Administrative Officer of the Government. The remaining Respondents were members of the Lexington-Fayette Urban County Government Civil Service Commission (Commission), appointees of the Mayor. Charter Sec. 7.03, *supra*.

Under the Government's Charter, Sec. 6.04, *supra*, Brady was the administrator of the Government's civil service program, and his position, Director of Personnel, was itself protected by the Government's civil service system. Charter 6.03, *supra*.

On September 19, 1974, Brady gave a press interview to a reporter with the *Lexington Leader*, a major local newspaper, resulting in the publication that same day of a front page news story based on the interview. See, p. 74a, *infra*. Brady's statements principally were levelled at the Mayor, the most serious of which concerned the Mayor's attempts at bending civil service rules for political purposes. When Brady entered the Council Chambers that night, he drew a standing ovation from the room full of government

employees. See, p. 81a, *infra*. Brady explained his actions of that morning to the Council during its meeting. Afterward, several Councilmen shook his hand.

A September 20, 1974 interview of Brady by the same reporter resulted in the publication of an additional front page news story based on that interview. See, p. 79a, *infra*. On September 24, 1974, in the Urban County Council Chambers, Brady reaffirmed his statements to members of the local media.

The Mayor's demand for Brady's immediate resignation was rejected by Brady. Under KRS 67A.280(1), *supra*, (initially, Brady was incorrectly charged under KRS Chapter 90), Brady could not be dismissed except for "inefficiency, misconduct, insubordination or violation of law involving moral turpitude", and, under KRS 67A.280(3), *supra*, only after a hearing, "limited to the issues presented by the written charges."

On October 17, 1974, the Mayor preferred two (2) charges of "misconduct" against Brady, based on Brady's statements to the press. The statements with which the Mayor took issue under Charge I are set out in the Appendix, at p. 69a, *infra*. By Charge I, the Mayor charged that "irrespective of (the) merit (of Brady's statements) or lack thereof", Brady had made them "in the public and unilateral channel of news media rather than through proper available channels." See, p. 71a, *infra*. (Brady claimed that he had gone to the Mayor, the administration and the Council before speaking publicly.) This conduct, the Mayor charged, "undermined public faith in the personnel system of the Government", disrupted communications between Brady

and others in the executive branch, and constituted "misconduct calculated to disrupt the orderly and harmonious operation of the Government, and its personnel system." See, p. 71a, *infra*.

By Charge II, the Mayor charged Brady with the "misconduct" of engaging in "news media activities" on September 20 and 24, 1974, by voicing publicly allegations against the Mayor and other members and officials of the Government "without first proceeding through the proper governmental channels." See, p. 72a and 73a, *infra*. Charge II concluded with the allegation that this "activity" constituted "misconduct" that "did, and continues to, impair the administration of the service in which he is engaged." See, p. 73a, *infra*.

The Mayor was not Brady's supervisor, immediate or otherwise. The Mayor's official relationship to Brady consisted of his authority to require reports from Brady relating to the business and general welfare of the Government, and the right to examine the records of Brady's office. Charter, Sec. 5.04, *supra*. The Mayor's general supervisory power over departments of Government, did not reach the Division of Personnel. Charter, 5.04, 6.02, 6.04, *supra*. The Office of Administrative Services, and therefore, the Division of Personnel, was under the direct control of the CAO, not the Mayor. Charter, Secs. 6.02, 6.04, *supra*. Under the Charter, the CAO was employed by the Council, who could be removed only upon a three-fifths ( $\frac{3}{5}$ ) vote of the Council members. Charter, Sec. 5.09, *supra*.

The Respondent-CAO, had, then, been recently hired from out-of-state to replace the Acting CAO (Sykes) mentioned in Charge I, see, p. 70a, *infra*, and assumed his duties on September 24, 1974, a date which just happened to

to coincide with the date of Brady's last public statement, mentioned in Charge II. See, p. 72a, *infra*.

Hearings on the Charges began on November 18, 1974, and the Commission heard twenty-eight (28) witnesses testify. They were: eleven (11) Urban County Council members, two (2) non-civil service appointees of the Mayor (the Commissioners of Law and Finance), three (3) former campaign workers for the Mayor (two of whom had become Government employees), a Research Analyst in the Mayor's office, the Acting Budget Director, the Acting Personnel Director (Brady's replacement), the Mayor's Administrative Assistant, the former Acting CAO, the Respondent-CAO, his Administrative Assistant, the Dean of the College of Architecture at the University of Kentucky, a part-time Job Analyst in the Division of Personnel, one (1) incidental witness, and, of course, Brady and the Mayor. The transcript exceeds 1300 pages.

By its Opinion, Findings and Decision of December 10, 1974, see, p. 23a, *infra*, the Commission found none of Brady's statements to be false, found some to be truthful, and found that Brady had "acted without malice." The Commission made no finding that there was a policy or regulation requiring employees to first go through governmental channels before speaking to the press. Except for the Acting CAO, against whom Brady had directed no criticism, and who had been replaced by the Respondent-CAO, the Commission made no finding that any of the officials identified in either charge were persons with whom Brady's job required a close, daily working relationship where personal loyalty and confidence were necessary for proper functioning. The Commission found that two (2) acts of the Mayor, raised by Brady, had the

"effect of undermining the intent of our civil service law." See, p. 29a.

However, the Commission found Brady guilty of the "misconduct" of making the statements "without first or simultaneously" making the statements or his concern therewith known to the persons involved (Brady disputes this finding), concluded that a "reasonable man under the same and similar circumstances would not so have conducted himself." See, p. 27a, *infra*. Parroting the non-specific consequences of Brady's speech, as set out in Charge I, see, p. 71a, *infra*, the Commission found that he had "undermined public faith in the personnel system of the government, caused a breach or disruption of communications between the Director of Personnel and other persons in the Executive Branch of the government", and "although without malice" constituted "conduct calculated to disrupt the orderly and harmonious operation of the government and its personnel system." See, p. 27a, *infra*. No specifics were cited. The Commission fixed his punishment at "discharge", effective December 31, 1974.

By his timely *Appeal and Complaint* to the Fayette Circuit Court, Brady sought reinstatement, claiming, inter alia, that he was entitled to have the charges dismissed as a matter of law, for the reason that the action "which resulted in said charges, was protected action under the First and Fourteenth Amendments to the Constitution of the United States", because there was no "finding by said Commission that the action taken by Brady consisted of false statements recklessly or maliciously made", and the Commission had found that "there was no evil or malice in a legal sense" on Brady's part.

In its February 7, 1977 Opinion, the Fayette Circuit Court framed the following question:



Does a public employee have an absolute constitutional right to make public comment regarding matters of public interest where the statements are true and not made with a reckless disregard as to truth and falsity? See, p. 39a, *infra*.

Holding that Brady had no such right, it upheld the Commission's decision.

The Kentucky Court of Appeals affirmed, by its Opinion of May 26, 1978, agreeing that Brady's situation was analogous to the exceptions stated in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and holding "that Brady had a duty to voice his criticisms internally, so as to avoid undermining public confidence in the government and to insure the government's orderly administration." See, p. 54a, *infra*.

Upon discretionary review, the Kentucky Supreme Court in *Brady v. Pettit*, Ky., 586 S.W. 2d 29 (1979) reversed on a "threshold" procedural question, and specifically declined to "consider the decision of the trial court on the merits of Brady's claim of violation of his first amendment rights." See, p. 60a, *infra*. The Kentucky Supreme Court directed the trial court, on remand, to proceed, as follows:

The trial court's review is limited to a determination of whether the administrative body acted *arbitrarily*. (Emphasis, the Court's). See, p. 66a, *infra*.

On remand, after some unrelated procedural skirmishing, Brady moved the Fayette Circuit Court for summary judgment on grounds that his discharge violated his First Amendment right of free speech. While his motion was pending, by Order, see, p. 91a, *infra*, the trial court allowed



Brady to file his Amended Complaint, see p. 86a, stating claims for relief under 42 U.S.C. §1983, seeking legal and equitable relief for the deprivation of his First Amendment free speech rights and protected property rights under the Fourteenth Amendment.

By its April 1, 1986 Opinion and Order, (the final order) the Fayette Circuit Court set aside its Order allowing the Amended Complaint. In doing so, it found the §1983 action to be "grounded on the same events which precipitated the within appeal", see, p. 9a, *infra*, but, because of "the passage of time alone", see, p. 10a, *infra*, and because an independent §1983 action would be "clearly barred by limitations", it could not be "born again" by the "relation back" provisions of CR 15.03. See, p. 10a, *infra*.

By that same Opinion and Order, the trial court upheld the Commission's discharge of Brady. Because the Kentucky Court of Appeals chose to "adopt" the trial court's opinion as its own, see, p. 2a, *infra*, what is recited here about the action of the trial court applies to the Court of Appeals.

The trial court described its standard of review (arbitrariness) as limited to (1) determining whether substantial evidence supported the Commission's findings and decision, and (2) determining whether the Commission's decision violated Brady's statutory or constitutional rights. See, p. 12a, *infra*.

The trial court found that the "public statements made by Brady and which formed the basis of the charges against him involve matters of public concern." See, p. 16a, *infra*.

As to the Commission's finding of truth in some of Brady's statements, and none to be false, the trial court found "that Brady's statements were not so much

statements of fact which could be proven or disproven, but were statements of his opinions and conclusions." See, p. 18a, *infra*.

Finding that the incidents which "formed the basis of Brady's conclusions were matters which would not have prompted a reasonable person to draw the same conclusions", see, p. 18a, the trial court, thereupon, found "that Brady's statements were substantially false." See, p. 19a, *infra*. The trial court did not elaborate.

As to Brady's alleged "misconduct" of speaking publicly without "first or simultaneously" going through governmental channels, the trial court held that Brady could *not* "first be required to exhaust specified grievance procedures before being allowed to speak publicly." See, p. 20a, *infra*.

The basis assigned by the trial court for upholding Brady's discharge was its holding that Brady had the duty not to speak publicly "until after a reasonable and rational investigation is made" and "the duty to consider the consequences of public speech before exercising the right", and that "in the reasonable exercise of (such duties) he should not have spoken at the time and in the manner in which he did speak." See, p. 20a, *infra*. Brady had not been charged with a breach of those duties.

On appeal to the Kentucky Court of Appeals, Brady claimed: (1) that discharging him for speaking truthfully, about matters of public concern, without malice or evil intent, violated his First Amendment free speech rights, (2) because his alleged "misconduct" was speaking publicly before going through channels, the trial court's holding that he was not required to exhaust grievance

procedures before being allowed to speak publicly, compelled reversal, (3) that his discharge could not be upheld based on the trial court's conclusion that he was guilty of the un-charged "misconduct" of speaking publicly before investigating, and failing to consider the consequences of his speech, (4) that the trial court exceeded the standard of review imposed by the Kentucky Supreme Court by making its independent determination that his statements were false, and (5) that the trial court erred in setting aside its Order granting him leave to plead his §1983 claim by Amended Complaint.

By its unpublished Opinion of May 22, 1987, see, p. 1a, *infra*, the Kentucky Court of Appeals adopted the trial court's Opinion as its own, and affirmed.

By timely motion, Brady sought discretionary review of the Court of Appeals Opinion, by the Kentucky Supreme Court. The questions of law raised on the motion are set out verbatim, at p. 93a, *infra*. The questions sought review of the First Amendment and §1983 questions presented here. On July 30, 1987, the Kentucky Supreme Court denied Brady's motion for discretionary review. See, p. 68a, *infra*.

**(j) REASONS RELIED ON FOR GRANTING THE WRIT**

Only with *Connick v. Myers*, 461 U.S. 138 (1983), and only because the statements did not substantially involve matters of public concern, has this Court upheld the discharge of a public employee for conduct, claimed by the employee to be an exercise of his First Amendment free speech rights. Attempting to avoid the effect of this Court's cases, significantly protecting the First Amendment rights of public employees, the Mayor disguised his intent to fire Brady for his public statements by describing Brady's "misconduct" as the conduct of speaking to the news media "rather" than going through governmental channels. Reviewing the discharge by the Commission, which had found none of Brady's statements to be false, the Court below used "reasonable man" and "ordinary care" principles to arrive at its conclusion that the statements were false, and upheld the discharge.

Because the question of whether a public employee's statements are First Amendment protected is one of law for this Court to determine, Brady's seeks review of the issues presented below.

1. *Does it violate the First Amendment speech rights of a civil service administrator to discharge him for the "misconduct" of not "first or simultaneously" proceeding through governmental channels before making substantially truthful statements to the press about abuses of the civil service system by officials, not his supervisors?*

This issue raises the question of whether disciplinary charges, from which "truth" was specifically excluded as an element, will support the discharge of a public employee for

his public statements critical of the official conduct of public officials, but found by the discharging body to be substantially true.

*Garrison v. Louisiana*, 379 U.S. 64 (1964), at 74, held that because of the First Amendment, "(t)ruth may not be the subject of either civil or criminal sanctions where the discussion of public affairs is concerned." *Garrison* was a criminal libel prosecution. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), a civil libel action, held that the First Amendment limits state power to award damages to a public official for criticism of his official conduct to those statements which are false and made with actual malice, that is, with knowledge that they were false or with reckless disregard of whether they were false or not.

In the area of public employee discharge, stating that it was neither appropriate nor feasible to do so, this Court, in *Pickering v. Board of Education*, *supra*, and in *Connick v. Myers*, *supra*, declined to lay down a general standard against which *all* public employees' statements violated the First Amendment. *Pickering*, involved the discharge of a public employee for his statements of public concern, some true and some false.

It is feasible in this case, however, to lay down a specific standard, much like the standard applicable in defamation actions by public figures, that a public employee who publicly criticizes a public official's official conduct is insulated by the First Amendment from the sanction of discharge, if his statements are true. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. \_\_\_\_\_, 89 L.Ed.2d 783, 106 S.Ct. \_\_\_\_\_ (1986), placed the burden on a *private* figure seeking damages, to prove that defamatory statements of public concern were false.

Insofar as *Pickering*, supra, at 574, held:

... that in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.

the judgment of the Court below is in direct conflict with it. However, insofar as *Pickering*, as just quoted, limited its holding to its facts, it has left unsettled its applicability to a case such as this. Here, the discharging body found the offending statements to be substantially true, and the Court below, though finding the statements to be "substantially false", did so, erroneously, on ordinary care principles.

This issue presents the additional, substantial constitutional question of whether a public employee may be discharged for the conduct of "prematurely" exercising his First Amendment free speech rights. Brady violated no local policy or regulation requiring him to go through governmental channels before speaking. In discharging him, the Commission made no finding as to how the consequences upon which it based his discharge could have been avoided, had Brady "first or simultaneously" gone through channels before speaking publicly.

There is an obvious chilling effect on those best able to expose official misconduct, if, in the absence of a valid regulation, they may be discharged for exposing an offending public official, sooner than he would have preferred. Assigning "misconduct" to the conduct of going through the news media "rather than through proper available channels", as the Mayor charged, and for not "first or simultaneously" going through channels, as the Commission

concluded, were but transparent devices to avoid a direct affront to Brady's First Amendment free speech rights, when firing him. This Court ought to accept this question to settle whether a public employee may be discharged for exercising First Amendment speech rights, prematurely, in the eyes of the discharging body.

2. *Where the employment-related consequences of a civil service administrator's statements to the press about official abuses of the civil service system were charged in non-specific terms, does it violate the administrator's First Amendment speech rights to discharge him for the consequences of his substantially truthful public speech, in the absence of findings of specific dire employment-related consequences of his public statements?*

The Mayor's Charges sought Brady's discharge, and the Commission discharged him, solely because of the alleged consequences of his speech. In *Connick*, supra, and again, in *Rankin v. McPherson*, 483 U.S. \_\_\_\_\_, 97 L.Ed.2d 315, 107 S.Ct. \_\_\_\_\_ (1987), this Court held that, in cases such as this one, the state employer bears the burden of justifying the discharge. When the consequences of an employee's words are to serve as the basis for his discharge, it should be settled that the fact-finder must identify the specific adverse employment-related effects of the employee's speech in order to weigh the state employer's interest in promoting the efficiency of the public services it performs through its employees, against the interest of the public employee in commenting on matters of public concern.

Under *Connick* and *Rankin*, this Court makes its own examination of the statements in issue, and the



circumstances under which they were made, to see if they are First Amendment protected. For the benefit of fact-finders, and courts reviewing cases which will not reach this Court, this question ought to be reviewed so as to specify that the state employer has not borne its burden of justifying the discharge, unless it has established the specific employment relationship between the speaker and the public officials spoken about, and the specific detrimental employment-related repercussions of the public speech.

The Commission made no mention of any personal, employment relationship, which, according to *Pickering*, is necessary to support a public employee's discharge for the consequences of his public speech. The finding of the Court below that Brady's position required "close working relationships" with those he criticized, is not borne out by the record. As elected officials, see, Charter Secs. 5.02, 4.01, the Mayor and the Urban County Council are natural adversaries of a Civil Service Administrator. The Acting CAO assumed other duties contemporaneous with Brady's statements. Brady's employment relationship with heads of other departments in government was occasional and distant.

This issue raises the additional important constitutional question of whether consequences, alone, in the face of truthful statements on matters of public importance will support the discharge of a public employee. A person is responsible for the consequences of having shouted "Fire!" in a crowded theater, only if, in fact, there was no fire.

Because the Commission and the Court below were so general in their findings as to the consequences of Brady's speech, this case is particularly appropriate for reviewing



whether consequences, regardless of truth, will support a discharge. *Pickering*, as involving both truthful and false statements, did not settle this question.

3. *Where the "merit" of his public statements was not an element of the disciplinary charges against a civil service administrator, but in firing him the Commission found his statements to be substantially true, was the administrator's claim that the First Amendment protected his conduct, defeated by the reviewing court's finding that his statements, as "opinions and conclusions", were "substantially false" because a reasonable person would not have concluded similarly?*

This issue relates to the Court's finding that the incidents "that formed the basis of Brady's conclusions were matters which would not have prompted a reasonable person to draw the same conclusions." See, p. 18a, *infra*. With that finding, the Court found Brady's statements to be "substantially false".

Because the Commission had found Brady's statements to be substantially true, and because the record does not reflect otherwise, the Court applied "prudent man" and "ordinary care" principles to arrive at its conclusion that Brady's statements were "substantially false". The Court below may have been mindful that truthful statements on matters of public concern are First Amendment protected. None of the opinions below, save the last one, concluded that Brady's statements were false.

The Court did not identify any statement which it deemed to be false. It made the remarkable finding that "opinions and conclusions" could be false and support a discharge. It did not identify any inconsistency between any

statement of Brady, and anything in the Transcript of Evidence of the Commission Hearing, which the Court may have perceived to be the truth.

Under *New York Times* and *Garrison*, in the area of public official defamation, a showing that the exercise of ordinary care would have revealed the statements to be false is insufficient to defeat the First Amendment privilege.

This Court ought to review this issue to settle the important constitutional question, applicable in the area of public official defamation, that principles of ordinary care are insufficient standards against which to judge whether a public employee's statements may be deemed "false" for purposes of his discharge. Under *New York Times* and *Garrison*, only false statements made with a high degree of awareness of their probable falsity, or lies, knowingly and deliberately published about a public official, do not enjoy First Amendment protection.

4. *May the discharge of a public employee for making public statements on matters of public concern, regardless of their truth, be upheld by the reviewing court's holding that by exercising his duties to make a "reasonable and rational investigation" and "to consider the consequences of public speech", the employee should not have spoken "at the time and in the manner" he did, where the employee claimed that his speech was First Amendment protected conduct?*

This issue, much like the preceding one, concerns the Court's application of "reasonable man" principles in upholding Brady's discharge. This issue relates to the Court's finding that "while Brady may not have actually known that the conclusions and opinions expressed by him

were false", see, p. 19a-20a, *infra*, he had the duty not to speak "until after a reasonable and rational investigation is made", and "the duty to consider the consequences of public speech before exercising the right." See, p. 20a, *infra*.

As pointed out above in *New York Times* and *Garrison*, defamation actions, a "high degree of awareness" of the probable falsity of statements on the part of the speaker is demanded before statements lose First Amendment protection. In *St. Amant v. Thompson*, 390 U.S. 727 (1968), a public official defamation action, this Court referring to *Garrison* and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) held that these cases make it clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. The evidence must permit a conclusion that the publisher entertained serious doubts as to the truth of his publication.

This Court ought to accept this question and settle, as it is settled in the area of public official defamation, that a finding that a reasonably prudent man would have investigated or considered the consequences of his speech before speaking, is insufficient to support the discharge of a public employee for public utterances on matters of public concern.

5. *May a state court, by setting aside its order permitting a 42 U.S.C. §1983 amended complaint to be filed, on grounds that the §1983 claim would be barred by limitations if filed as an independent action, defeat the §1983 claim found to be grounded on the events which precipitated the original action, and timely under the "relation back" provisions of Kentucky Civil Rule 15.03(1)?*

Like its counterpart in the Federal rules, Kentucky's Civil Rule 15.03(1) has a "relation-back" feature applicable to an amended pleading, grounded on the same occurrence as the original pleading. Kentucky's highest court, in *Perkins v. Read*, Ky., 616 S.W.2d 495 (1981), held that allowing the filing of an amended complaint which had met the relation back standard of CR 15.03(1), and then dismissing it as being time barred, was reversible error. Under *Read*, the Court below committed error.

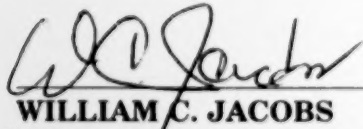
*Martinez v. California*, 444 U.S. 227 (1980) held that conduct wrongful under 42 U.S.C. §1983 cannot be immunized by state law. Although *Martinez* was dealing with a statute, and not the misapplication by a state court of state law so as to defeat the §1983 claim, the Respondents have no less been immunized from Brady's §1983 action by the Court's erroneous decision.

This Court ought to accept this issue to settle the important federal question of whether a §1983 action may be defeated by the misapplication of state law by a state court.

**CONCLUSION**

WHEREFORE, Petitioner prays that his Petition for Writ of Certiorari to review the decision of the Kentucky Court of Appeals be granted, with further proceedings pursuant to the Rules of this Court.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'W.C. Jacobs', is written over a horizontal line.

**WILLIAM C. JACOBS**

173 North Limestone Street  
Lexington, Kentucky 40507  
(606) 254-9086

*Attorney for Petitioner*